**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**
**IN THE ABUJA JUDICIAL DIVISION**
**HOLDEN AT GWAGWALADA**

**THIS MONDAY, THE 18TH DAY OF MAY, 2020**

**BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE**

**SUIT NO: FCT/HC/CV/2243/10**
**MOTION NO: M/690/2019**

**BETWEEN:**

1. **STYCON PETROLEUM (NIG) LTD**
2. **ALHAJI ABDULMUNAF YUNUSA**

**.....PLAINTIFFS**

**AND**

1. **LIZA COMMERCIAL ENTERPRISES LIIMTED**
2. **MR SAEED ALI JAMAL**
3. **MRS SAEED ALI JAMAL**
4. **THE HON. MINISTER OF THE FCT**
5. **FEDERAL CAPITAL DEVELOPMENT AUTHORITY (FCDA)**
6. **COMMISSIONER OF POLICE FCT, ABUJA**

**..DEFENDANTS**

## RULING

By a motion on notice dated 1st November, 2019 and filed on 4th November, 2019 in the Court's Registry, the Plaintiffs/Applicants seek for the following reliefs:

1. **An Order setting aside the order foreclosing the Plaintiffs/Applicants made on 19th day of September, 2019.**

2. **An Order of this Honourable Court allowing the Plaintiffs/Applicants to re-open their case and call their last witness (Alhaji Shehu Turaki) whose statement on Oaths was filed along the substantive suit in 2010 before this Honourable Court.**

3. **And for such further Order(s) as this Honourable Court may deem fit to make in the circumstances of this case.**

In support of the application, is a nine (9) paragraphs affidavit with two (2) annexures marked as **Exhibits A and B**. A brief written address was filed in compliance with the Rules of Court in which one issue was raised as arising for determination, to wit:

**"Whether the applicants are entitled to the grant of this application."**

The address which forms part of the Records of court is to the effect that the applicant has on the materials supplied or disclosed sufficient reasons to allow the court grant the application.

The 1st and 2nd Defendants filed a Counter Affidavit in opposition together with a written address in which two issues were raised as arising for determination, to wit:

1. **Whether this Honourable Court has the power to grant the reliefs sought by the Plaintiffs/Applicants in Motion No: M/690/2019.**

2. **Whether the court is not *functus officio* to set aside its interlocutory order made on the 19th day of September, 2019 closing the case of the Plaintiffs/Applicants in this suit and to re-open the plaintiffs case.**

The summary of the submissions which equally form part of the records of court is that in respect of issue (1) that the court does not have the powers to grant the reliefs sought and in relation to issue (2) that the court is *functus officio* and cannot properly set aside its decision foreclosing the plaintiffs' case.

On the part of 4th and 5th Defendants, they filed an eight (8) paragraphs counter affidavit with a written address in which two (2) issues were equally raise as arising for determination thus:

1. **Whether the Plaintiffs/Applicants have made out a case for setting aside the Order of this Court made on the 19th day of September, 2019 or to allow Plaintiffs/Applicants to re-open their case.**

2. **Whether a party will be allowed to aprobate and reprobate at this same time.**

The substance of the submissions which equally forms part of the Records of court is that on issue (1) the Applicants have not made out a case on the materials providing legal and factual basis to allow the court set aside the order of foreclosure and on issue (2) the case made out is that Plaintiffs' counsel made clear his position that if he does bring his witnesses on the next adjourned that his case be closed. That he was not in court on the date as agreed and his case was closed. That in such circumstances, he cannot be seen to complain about the foreclosure.

At the hearing, counsel on either side of the aisle adopted the depositions on there respective affidavit and counter-affidavits and each relied on the contents of their written addresses in urging the court to grant the application.

I have carefully considered all the processes filed and the submissions of counsel. I note that some of the issues raised and the submissions made particularly by defendants clearly goes beyond the ambit and remit of the application dealing with the powers to re-open a case closed. The narrow issue that arises for determination is simply whether the court should in the circumstances grant the application to re-open applicants' case.

Now contrary to the position advanced by counsel to the 1st – 3rd defendants, the grant of an application to re-open a case closed is essentially discretionary. The grant of the application is however not as a matter of course or on whimsical or no grounds at all. A party seeking the indulgence of court in that respect must disclose cogent and sufficient reasons for so doing.

In **Nebo V FCDA (1998) 11 NWLR (pt.574) 480**, the Court of Appeal stated as follows:

**"An application by a party to re-open an already closed case is an invitation to the court to exercise its discretion in his favour in which case, the applicant must disclose reasons sufficient to persuade the court to exercise its discretion**

**in his favour. The principle here is similar to when a party who has failed to take a legal step within time stipulated is now seeking the court's indulgence to have time extended for him, which must be backed up with convincing reasons to enable the court exercise its discretion in his favour."**

The Court of Appeal in **Alhaji Sulyman Aliyu V. Lawal Alhaji Alma (2013) LPELR – 21857 (CA)** adopted the above principle in **Nebo V FCDA (supra)** and added another element thus:

**"A party seeking to re-open his closed case would require the consent of his opponent in the absence of which he has to depend on the discretion of court."**

Now learned counsel to the 1st – 3rd defendants stated in paragraphs 3.05 and 3.06 of his address to the effect that the Court of Appeal in **Nebo V. FCDA (supra)** did not order that the case closed at the lower court be re-opened on appeal. I don't really know what to make of this submission. The fact that the Court of Appeal in the said case did not allow the appeal does not mean that the principle enunciated is no longer in operation. Principles of law do not exist in a vacuum. They are applied to facts of each case and these facts may vary from case to case. Where the facts supplied do not put a court in a commanding position to grant the application to re-open a case or to grant any relief, the application must as a logical corollary fail. That is however not a failure of the principle but a failure of facts supplied. The principle however remains extant.

The point to underscore from the above decision is clear. The matter of re-opening a case is clearly an interlocutory application and its failure or success is based on the judicial and judicious exercise of Discretion of Court predicated on the quality and value of the materials supplied.

In the extant case, the defendants have chosen or elected not to give consent. The Applicants are here therefore logically inviting the court to intervene and exercise its discretion in their favour. To allow for the court's intervention, they must have disclosed on the materials sufficient and cogent reasons to persuade the court to exercise its discretion in their favour. See **Nebo V FCDA (1998) 11 NWLR (pt.574) 480.**

The pertinent question here is this: **Have the Applicants disclosed sufficient and cogent reasons in the circumstances?**

Let us take our bearing from the affidavit of the applicants who averred as follows:

**"5. That I was informed by A.M. Ma'aji Esq. for counsel handling this matter sometime in 24th October, 2019 in our office A.M. Ma'aji & Partners of the above address at the hour of 1:00pm of facts which I verily believe to be true as follows:**

**… d. Consequent upon paragraph c above, the court acceded to our request and adjourned the matter to 21st October, 2019. Copy of the hearing notice served on the plaintiffs is hereby attached and marked as Exhibit A.**

**e. That on the return date we were in court with our last witness Alhaji Shehu Turaki but discovered that we were already foreclosed and the defence had already open their case in our absence on that same 19th day of September, 2019.**

**f. That the business of the court on the 21st October was the cross-examination of DW1 Mr. Saeed Ali Jamal and continuation of Defence.**

**g. That the 1st – 3rd defendants took their remaining one witness and close their defence.**

**h. That the matter is adjourned to 4th November, 2019 for the 4th and 5th defendants defence.**

**i. That the plaintiffs/applicants have only one last witness to call in person of Alhaji Shehu Turaki.**

**j. That the testimony of the Alhaji Shehu Turaki is vital for the Plaintiffs case and for the determination of the case before this Honorable Court."**

The question that comes to mind immediately is this: **Does the above representation reflect the true position of what transpired in court leading to the order of foreclosure?** I will here have recourse to the records of court to situate the correct facts which then provides a factual and legal template to situate the justice and fairness of this Application. I will only however state the relevant facts necessary to determine this application.

Let me start by saying that this matter was initially filed as far back as 2010 before the Honourable, the Chief Judge of FCT. It is a matter involving ownership of a

property and a matter to be resolved on fairly settled principles. In 2016, it was transferred to my court. After several faltering steps, hearing commenced on 16th January, 2019 with plaintiffs calling PW1. At the end of his evidence, plaintiffs counsel sought for an adjournment to put his house in order with respect to evidence of his next two witness. The court expressed strong reservations about the adjournment but granted same and adjourned the matter to 20th March, 2019 for continuation of hearing. On the said date, neither the plaintiffs or their counsel were in court but a letter was written by counsel praying for an adjournment on grounds that he travelled for **lesser Hajj**. The defendants expressed dissatisfaction with the conduct of plaintiffs' counsel but conceded and ask for cost. I again expressed my reservations and adjourned the matter to 30th April, 2019 for continuation of hearing and awarded N10, 000 cost against plaintiffs. The court did not sit due to court renovations and the matter then came up on 30th May, 2019 when plaintiffs called PW2. At the conclusion of his evidence, learned counsel again asked for another adjournment to call his next witness. Court immediately expressed its profound disapproval with the piece-meal calling of witnesses for a matter filed nearly nine (9) years now. Counsel obviously appreciated that they have been delaying this proceedings and stated thus:

**"Ado: I really apologise for the inconveniences; if I don't bring him on the next date, I will close my case."**

The defendants conceded to the adjournment and I ruled thus: **"The court will grudgingly grant this adjournment for the very last time to allow the plaintiffs to produce their last witness. Matter adjourned to 19th September, 2019 for continuation of hearing."**

This matter was adjourned to 19th September, 2019 because of the courts' annual vacation and with the agreement of all counsel. Now on 19th September, 2019 after the fairly long adjournment, counsel did not appear in court and so too the plaintiffs. Counsel again wrote praying for another adjournment that he travelled out of the country and was not able to make it back. Counsel clearly did not therefore live up to his commitment to bring his last witness or his case be close more than three (3) months after the last adjournment. It was at that point after five (5) adjournments from when hearing commenced on 16th January, 2019 and all at instance of plaintiffs as recorded above that the court gave a considered ruling

and foreclosed the case of plaintiffs and allowed the 1st – 3rd defendants to open their defence. They called their first witness and the court bent over backwards after the evidence of **DW1** and adjourned the matter to allow plaintiffs cross-examine DW1. The matter was then adjourned to 21st October, 2019 and hearing notice was served on plaintiffs.

On 21st October, 2019, nearly a month after the foreclosure of plaintiffs case, counsel who appeared for the plaintiffs said he was not aware that the case was foreclosed and that they have a witness in court. This clearly meant that neither counsel or plaintiffs took steps to know what happened in court on 19th September, 2019. Counsel said he wanted an adjournment but it was refused and the court graciously granted a stand down to enable him cross-examine DW1. The 1st and 2nd defendants then called their last witness DW2 and with his evidence the 1st – 3rd defendants closed their case and the matter was adjourned to 4th November, 2019 when the 4th and 5th defendants called their 1st witness DW3. At the end of her evidence the matter was then adjourned to 5th December, 2019 for them to call their last witness. It was at this point that the plaintiff filed the extant application.

I have at length stated the facts of this case to show that the plaintiffs distorted the true facts of this case in their affidavit in support with respect to what led to the foreclosure. The trajectory of the above facts shows either an unwillingness on the part of plaintiffs and their counsel to diligently prosecute this case within a reasonable time despite the ample time given to them or a case of simply apathetic indifference to the prosecution of a matter filed nearly a decade ago.

Under our Rules of Court, **Order 32 Rules 12 (1) and (2)** provides thus:

**"12(1) A party shall close his case when he has concluded his evidence. The claimant or defendant may make an oral application to have the case closed.**

**(2) Notwithstanding the provisions of sub-rule 1 above, the court may *suo-motu* where he considers that either party fails to conclude his case within a reasonable time, close the case for the party."**

The above rules are clear. I have here carefully gone through the affidavit of Applicants and it is difficult to situate the cogent reasons or explanation as to why the extant application should be availing. The Applicants have not addressed the critical point of whether they prosecuted their case within a fair and reasonable

time. A follow up question here is were they given ample time to present their witnesses?

The pivot of the affidavit of Applicants appear to be **ground of interest of justice** and no more as if the interest of justice can be divorced from the reality of the facts of a particular case.

Now it is true that the quest for justice is the most important consideration when cases are submitted to the courts for resolution. The determination of cases in court is however determined by a defined set of legal protocols which a party must adhere to and this includes the exercise of due diligence in the prosecution of cases. A party who conceives he has a cause of action and files same in court must ensure he appears in court diligently to press his claims. The impression sought to be created that justice is a one way traffic or that because the case involves properly rights and as such the plaintiffs have till eternity to pursue such claims is with respect grossly misplaced. The interest of justice demands that parties in appropriate cases be afforded reasonable opportunity for their complaints to be investigated and determined on the merits so long as the equities of the matter are not defeated and no injustice to the other party is occasioned. See **Long John V Blakk (1998) 6 NWLR (pt.555) 524.** I must also underscore the point that the right to be heard must however necessarily be circumscribed within proper limits and not allowed to run wild. No party has till eternity to present its case or defend an action.

The posers earlier raised by court the Applicants have failed to answer. The plaintiffs/Applicants have been given more than ample time to present their case. They have sought to do so piecemeal and were given several adjournments to do so. Indeed as stated earlier on, Counsel realised that they were practically delaying this proceedings and to enable him get the adjournment, he indicated that if on the next adjourned date he does not provide or bring his witness, he will close his case. On the next adjourned date, he was not in court and neither were the plaintiffs. The case of plaintiffs was then rightfully closed. It is really difficult to now situate the call to re-open in view of the stated position of counsel. A party cannot blow hot and cold at the same time or project diametrically opposed positions in the same case. The plaintiffs cannot be seen to be taking the court for a ride. The question that has concerned the court is why must the defendants continue to suffer

the injustice of a case perpetually hanging over their heads by a litigant or party who has not shown any genuine desire to pursue its claims. Justice in all its magnificence is not only for the plaintiffs but also the defendants. The true concept of justice can only have any meaning and resonance if it protects and treats equally and fairly all that stand before it.

The provisions dealing with fair hearing under the constitution is for the protection of both parties. It will be unfair to construe same as done by the plaintiffs as conferring a protection to only them or one of the parties to a case. In **Willoughby V I.M Bank (Nig) Ltd (1987) 1 NWLR (pt.48) 105 at 131**, the Supreme Court stated thus:

**"…the courts primary function is to do justice between the parties in dispute. One sided justice will amount to injustice… The law is made to ensure justice. Rules of Court are hand maids of justice. It is only by the orderly administration of the law and obedience to the Rules that legal justice can be attained. When a particular decision is against all known Rules, against all known principles, then it is certainly not made in the interest of justice."**

All parties are indeed guaranteed the constitutional right to a fair trial within a reasonable time under **Section 36 of the 1999 Constitution** and each party is equally entitled to a fair opportunity to present its case. No party as stated earlier however has till eternity to do so.

The Applicants have had ample time to fully present their case if they were really truly desirous of doing so but they chose or elected not to do so until now after the 1st-3rd defendants have concluded their case and the last set of defendants have called their first witness and have only one more witness to conclude their case.

The point may be made that the failure to take appropriate steps is the fault of counsel. Now it is true or correct that the general rule is that mistakes of counsel ought not to be visited on litigants but it is not a water tight principle and does admit of exceptions. The law is indeed settled that the principle will not be availing where there is a failure of strategy; where there is mischief or where there is ineptitude or inadequacies on the part of counsel. See **NNPC V Samfadek & Sons Ltd (supra); Bello Akanbi V Alao (supra).**

Counsel to the Applicants here did not do the needful as and when required and as he himself promised and the instrument for re-opening of a case cannot be used as a conduit to do what should with reasonable diligence have been done long ago.

To permit the opening of this case at this late stage will not only alter the dynamics of the case but create the effect of further unnecessarily prolonging this civil matter that has dragged now for nearly ten (10) years. The defendants may for example elect to further put up a case in rebuttal or a narrative with respect to the said evidence of the last witness sought to be called now and one can then only imagine how the trajectory of this case will then ultimately pan out. It is equally difficult to see how the overall interest of justice will be served by granting this application. The court must remain an impartial and dispassionate arbiter holding evenly the scale of justice. Nothing must therefore be done or seen to be done that would create the impression that one party is given any form of advantage over the other party.

Furthermore, the failure to present witnesses cannot solely be blamed on counsel because the plaintiffs were also not in court or represented on the 19th September when the case was foreclosed. The rather easy and convenient excuse to always blame counsel for want of diligence to prosecute a matter can no longer be used in our jurisprudence as a cover for unserious litigants. Litigants must show or exhibit heightened levels of interest when they instruct lawyers to file cases on their behalf.

In **Kano Textile Printers V Gloede & Hoff Nig. Ltd (2002) 2 NWLR (pt.751) 420 at 459,** the Court of Appeal per Salami, J.C.A (as he then was) stated thus:

**"A litigant has a duty to check on his counsel if necessary steps are being taken in a case; if he failed to do so, he is as guilty as his counsel and is not entitled to any indulgence."**

Similarly in **SCC Nig. Ltd V Our line Ltd (1996) 4 NWLR (pt.444) 561,** the Court of Appeal per Achike JCA (as he then was) also stated as follows:

**"The weight of judicial opinion in respect of discretion to extend periods prescribed for doing an act, is that the court should not over-indulge an erring party whenever he says that the error in complying with the court order is that of his counsel or clerk of the counsel. The judicial attitude has been**

**accentuated by dictates of justice which demand that justice should be even handed. It should be two way traffic, to the applicant and the respondent. What this means is that there may arise, certain circumstances in which the court may take a rigid posture and decline to indulge the party who has defaulted with regard to time in carrying out specific order, or orders of a court.**

**There is therefore a growing tendency to limit reliance on blunders on counsel and parties."**

Indeed the tendency to blame counsel in all manner of situations to achieve particular purposes is no longer fashionable. The courts **must exact** from parties and counsel utmost diligence in the prosecution of cases if the early determination of cases is to really make any headway.

The point to underscore is that applications of this nature while clearly an invaluable tool in the trial process, it is however an application that the court must consider with circumspection guided solely by the dictates of justice and providing firm and fair template for parties to present their grievances. Any indulgence granted at the expense of either party will be an injudicious exercise of discretion. The extant application cannot therefore be granted as a matter of course or routine. If it were otherwise, then matters and especially the trial process clearly would never end.

Indeed if the court were to permit or grant indiscriminately applications of this nature, then I am afraid the court will be setting a precedent difficult to support and sustain as there will be no end to litigation and the rules of court and relevant enactments regulating the trial process will no longer matter. See **Bassey V. Ekanem (2001)1 N.W.L.R (pt.694)376.** I leave it at that.

As I round up, I find it instructive to call in aid the instructive observations of the Supreme Court on the imperative to exact due diligence on parties and counsel in the prosecution of cases. In the case of **Chief Nicholas Banna V Telepower (Nig) Ltd (2006)** SC 407/2001 delivered on 7th July, 2006, the Apex Court held per Oguntade J.S.C as follows:

**"It is needful that it be stressed that a plaintiff who is not ready to pursue his suit with diligence upon which the court must insist has no business bringing**

**such case to court. Counsel and parties alike must bear in mind that the time of the court is valuable and must be apportioned between the different cases requiring attention. It is the duty of the court to proceed with the hearing of the cases before it expeditiously. The courts in the land must exact from parties and counsel as much diligence in the prosecution of their Cases as would enable the court consign the incidence of congestion in our courts to history."**

In his own contribution, Niki Tobi JSC (of blessed memory) stated thus:

"**The best judge in trial procedure is undoubtedly the trial judge. He sees it all because he closely watches the proceedings and all that. He feels the pinch when parties try to dill-dally the proceedings or adopt tricks to overreach or outsmart the adverse party. If the trial judge fails to take a position in the light of the rules of court and takes or tows the line of sympathy in the way the Court of Appeal did, then he will have a plethora or load of cases in his cause list to the extent that he cannot get out of a mounting backlog of cases. That will reflect on him adversely and in these days of continuous assessment of the performance of judges, he will be in for it. While I concede that a trial judge cannot throw away the constitutional provision that parties should be given a hearing in matters before the court because of repercussions of performance assessment, a judge owes the administration of justice a duty to facilitate and ensure the speedy hearing of a case before him. The notoriery that delayed justice attracts to the judiciary is such that judges must work towards the speedy dispensation of justice. We do not have a choice in this troublesome matter. Let us do our best and out best is to facilitate the speedy hearing of cases.**

**A plaintiff has not only a right to file an action in court to redress a wrong done him by a defendant, he also has a duty to prosecute the matter to conclusion within the rules of court. Of course, the duty is not mandatory, compulsory or sacrosanct, as he can decide not to prosecute. A plaintiff who files an action in court and exhibits some indolence and nonchalance has himself to blame. After all, he brought the defendant to court and if he decides not to pursue the case diligently, the court has no option than to either strike out or dismiss the matter, depending on the enabling rules of court."**

Aloma Mukhtar JSC (as she then was) added as follows:

**"…As is demonstrated in the suit that culminated in this appeal, the plaintiff who should in fact exhibit more zeal and anxiety in prosecuting this case which it had filed seeking for some reliefs decided to forget or neglect the suit by not appearing in court or finding out the position of his suit in the registry, just because it had engaged the services of a Solicitor. It certainly did not expect the trial judge to merely fold his arms and allow the case to be adjourned until the plaintiff deemed it convenient for the case to be heard or disposed of before he can act, most especially as the defendant was diligent and always in court each time the case came up."**

The above exhortations by the Apex Court are clear.

Cases of this nature and the disposition of plaintiffs since the matter was transferred to this court in 2016 makes a complete parody of the attempts at reducing incidence of the ever increasing mountain of backlog of cases. One more point. A judicial and judicious exercise of discretion cannot also be exercised on the basis of sympathetic consideration or benevolence. Justice is for both sides and not the convenience of one side. The Applicants here have clearly not disclosed cogent reasons and I hold that sufficient materials have not been disclosed to enable me exercise my discretion in favour of the plaintiffs/applicants.

The application therefore fails and it is hereby dismissed.

**…….**
**Hon. Justice A. I. Kutigi**

**<u>Appearances</u>:**

1. **Ado Ma'aji, Esq. with Aliyu Anas for the Plaintiffs/Applicants.**

2. **A.U. Umoso Esq. for the 1st – 3rd Defendants/Respondents.**

3. **Bamidele O.F. (Mrs.) for the 4th and 5th Defendants/Respondents.**